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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

WILLIE DONALD,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

CITY OF LOS ANGELES POLICE DEPARTMENT et al.,

Real Parties in Interest.

B210631

(Los Angeles County Super. Ct. No. BA339887)

Petition for writ of mandate. Barbara R. Johnson, Judge. Writ granted.

Michael P. Judge, Public Defender, Albert J. Menaster, Marie Girolamo and Mark Harvis, Deputy Public Defenders, for Petitioner.

No appearance for Respondent.

Rockard Delgadillo, City Attorney, Carlos De La Guerra, Assistant City Attorney, Kjehl T. Johansen and Jess J. Gonzalez, Deputy City Attorneys, for Real Parties in Interest.

* * * * * *

Petitioner Willie Donald seeks a writ of mandate directing the superior court to set aside an order denying his motion for pretrial discovery under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). We find that petitioner established good cause for discovery under *Warrick v. Superior Court* (2005) 35 Cal.4th 1011 (*Warrick*) and grant the petition.

BACKGROUND

According to the arrest report, on April 29, 2008, at approximately 3:50 in the afternoon, Detectives R. Kitzmiller and A. Gamboa of the Los Angeles Police Department were working in an undercover capacity in an unmarked vehicle near 6th and San Julian Streets, in Los Angeles, an area with a high incidence of narcotics activity. The officers were in an observation post monitoring that intersection using binoculars when they saw petitioner standing on the sidewalk, with his back towards a wall. A second individual, Clarence Pittman, was seen approaching petitioner and the two engaged in a brief conversation. The officers observed Pittman hand petitioner what appeared to be U.S. currency, which petitioner put into his right front pants pocket. Petitioner then took a clear plastic bindle from his left front pants pocket, held it over his right open palm and shook the bindle. He then held his right open palm out towards Pittman, who reached over and appeared to take a small item from petitioner's hand. Pittman then walked away.

Based on the officers' training and experience, they believed that a narcotics transaction had taken place, and officer Gamboa alerted chase officers to detain petitioner and Pittman. As Detective Miller approached Pittman, Pittman dropped an off white solid to the sidewalk from his left hand; he was detained without incident. Upon closer examination, Miller recognized the solid to resemble cocaine base, and Pittman was arrested for possession of a controlled substance, in violation of Health and Safety Code section 11350 (a).

Officers Mejia and Valencia arrested petitioner without incident at San Julian and 6th Street. Officer Mejia recovered \$12 in U.S. currency from petitioner's right front

pants pocket. Petitioner was arrested for sale of a controlled substance, in violation of Health and Safety Code section 11352.

By information filed May 27, 2008, petitioner was charged with violating Health and Safety Code section 11352, subdivision (a), with an allegation that he had suffered a prior conviction within the meaning of Penal Code sections 1170.12(a) through (d) and 667(b) through (i), and that he had suffered prior convictions pursuant to Penal Code section 667.5(b).

On June 25, 2008, petitioner filed a notice of motion for pretrial discovery, seeking "[a]ll complaints . . . relating to racial bias, gender bias, ethnic bias, sexual orientation bias, coercive conduct, violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure; false arrest, perjury, dishonesty, writing of false police reports, writing of false police reports to cover up planting of evidence, false or misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude within the meaning of *People v. Wheeler* (1992) 4 Cal.4th 284 against Los Angeles Police Officers R. Kitzmiller, #31907; and A. Gamboa, #31653." Petitioner sought production of the names and contact information of those who might be witnesses or were interviewed during investigation of any such complaints.

In support of the motion, counsel for petitioner submitted a declaration under penalty of perjury that stated, in part, that petitioner contends that Officers Kitzmiller and Gamboa "fabricated evidence and misrepresented information in the police report in order to justify an otherwise illegal arrest. Specifically, I am informed and believe that Officer Kitzmiller misrepresented material facts when he wrote in the police report that he and Officer Gamboa saw Mr. Donald engage in a hand to hand sale of cocaine. The defense is further informed and believes Officer Kitzmiller committed perjury when he testified in conformity with the false information contained in the police report at the preliminary hearing" Counsel offered the following specific factual basis for the court's consideration: "The defense is informed and believes Mr. Donald was in the area

prior to his illegal detention and arrest to have dinner at a homeless shelter. That he did not engage in a conversation with the [sic] any person for the purpose of selling drugs, and did not engage in a hand to hand sale of cocaine to co-defendant, or any other person, as alleged in the police report. Further, that the money recovered from Mr. Donald's possession at the time of his arrest was not the product of the sale of drugs to co-defendant or any other person."

Real parties in interest opposed the motion, arguing that counsel's declaration was "nothing more than a bald denial of what is alleged in the arrest report. . . . [Petitoner] states that the officer lied about [petitioner] engaging in a hand to hand sale of cocaine. [Petitioner] fails to state any factual alternative scenario in contradiction of the police report. [Petitioner] merely denies any unlawful activity. Nowhere has [petitioner] stated a specific factual scenario to support good cause to review these officers' confidential personnel records." Respondent cited *People v. Thompson* (2006) 141 Cal.App.4th 1312 (*Thompson*), in support of their opposition.

The superior court denied an in camera review of the requested documents, stating that it did not "see anything that gives a plausible factual scenario" and that defense counsel's declaration contained "nothing . . . [more than] mere denials."

A petition for writ of mandate followed, which this court summarily denied, with one dissenting vote. Petitioner then filed a petition for review in the California Supreme Court, which issued an order directing the issuance of an alternative writ. Although this court followed that directive, the superior court elected not to comply, and petitioner brought the matter before us once again.

DISCUSSION

Petitioner contends that the trial court erred in denying his *Pitchess* motion without conducting an in camera review of the requested police personnel records. We review the court's ruling on a motion for access to law enforcement personnel records for abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

Evidence Code sections 1043 and 1045 establish a two-step procedure for a defendant's *Pitchess* discovery of peace officer records. (*People v. Hustead* (1999) 74 Cal.App.4th 410, 416; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019.) "To initiate discovery, the defendant must file a motion supported by affidavits showing 'good cause for the discovery,' first by demonstrating the materiality of the information to the pending litigation, and second by 'stating upon reasonable belief' that the police agency has the records or information at issue. [Citation.]" (*Warrick, supra*, 35 Cal.4th at p. 1019.) If a defendant demonstrates good cause, the trial court must examine the material sought in camera to determine whether disclosure should be made and disclose "only that information falling within the statutorily defined standards of relevance." (*Ibid.*)

There is a "relatively low threshold" for establishing the good cause necessary to compel in camera review by the court. (*Warrick, supra*, 35 Cal.4th at pp. 1016, 1019.)

To establish good cause, "defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges" and articulate how the discovery sought might lead to relevant evidence. (*Id.* at p. 1024.) The defense must present "a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Id.* at p. 1025.) A scenario sufficient to establish a plausible factual foundation "is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Id.* at p. 1026.)

Depending on the circumstances of the case, the "denial of the facts asserted in the police report" may establish a plausible factual foundation. (*Id.* at pp. 1024–1025, citing *People v. Hustead, supra*, 74 Cal.App.4th 410; see also *Garcia. v. Superior Court* (2007) 42

Cal.4th 63, 72 (*Garcia*).)¹

In *Hustead*, a defendant facing a charge of felony evasion of arrest brought after a high-speed automobile chase submitted in support of a *Pitchess* motion a declaration denying that he had driven in the way or along the route described by the officer. The appellate court concluded that defense counsel's declaration made allegations sufficient

A *Pitchess* motion need not provide a motive for the alleged officer misconduct, show that it is reasonably probable the defendant's version of events actually occurred, or show that his story is persuasive or credible. (*Warrick, supra,* 35 Cal.4th at pp. 1025-1026.)

The trial court erred in finding a lack of good cause for in camera review of the requested records.

Warrick controls our analysis. In that case, the defendant was charged with possession of cocaine for sale and possession of burglary tools. The police report stated that the three arresting officers had been patrolling an area known for narcotics activities when they noticed Warrick standing next to a wall, holding a clear plastic baggie containing what appeared to be rock cocaine. When officers exited their patrol vehicle, Warrick ran, tossing the cocaine to the ground. After a short pursuit, Warrick was arrested. He had an empty baggie in his hand, and his pockets contained \$2.75 in cash and porcelain spark plug chips, a common tool used by auto thieves to smash car windows. In addition, the officers found 42 rocks of cocaine on the ground. (Warrick, supra, 35 Cal.4th at pp. 1016–1017.)

Warrick filed a *Pitchess* motion seeking, inter alia, disclosure of complaints against the three arresting officers for making false arrests, falsifying police reports, or planting evidence. (*Warrick, supra*, 35 Cal.4th at p. 1017.) In support of the motion, defense counsel submitted a declaration giving the following version of the events leading to Warrick's arrest: "When the three officers got out of the patrol car, defendant, who feared an arrest on an outstanding parole warrant, started to run away, but within moments the officers caught up with him. Meanwhile, there were 'people pushing and kicking and fighting with each other' as they collected from the ground objects later determined to be rock cocaine. After two officers retrieved some of the rocks, an officer

to establish a plausible factual foundation for a defense that the defendant did not drive in the fashion described in the police report and that the officer's report was untrue. (*People v. Hustead, supra*, 74 Cal.App.4th at p. 417.)

told defendant, "You must have thrown this." Defendant denied possessing or discarding any rock cocaine. He said he was in the area to buy cocaine from a seller who was present there. Defense counsel suggested that the officers, not knowing who had discarded the cocaine, falsely claimed to have seen defendant, who was running away, do so." (*Ibid.*) The appellate court concluded *Warrick* had failed to establish good cause. (*Id.* at p. 1018.)

The California Supreme Court rejected the appellate court's conclusion, finding that Warrick's denial that he had possessed or discarded the cocaine, coupled with the assertion that the police had falsely accused him, presented a specific factual scenario. (*Warrick, supra*, 35 Cal.4th at p. 1023.) The Court also concluded that a finding of good cause did not require a further showing that the factual scenario proposed by Warrick actually occurred (*id.* at pp. 1023–1024), and that Warrick was not required to articulate a motive for the alleged officer misconduct. (*Id.* at p. 1025.)

Similarly here, petitioner's version of events is plausible given the factual scenario described in defense counsel's declaration. The declaration asserted that the officers "fabricated evidence and misrepresented information in the police report in order to justify an otherwise illegal arrest." In other words, the officers lied when they declared that petitioner engaged in a conversation with Pittman for the purpose of selling drugs and that he had conducted a hand-to-hand sale of cocaine to Pittman. The scenario described in defense counsel's declaration is internally consistent. It conflicts with the police report only in denying that petitioner engaged in a conversation with Pittman for the purpose of selling drugs and in denying that he engaged in a hand-to-hand sale of cocaine to Pittman. In addition, petitioner alleged that the money recovered at the time of his arrest was not the product of the sale of drugs. These denials, coupled with petitioner's nonculpable explanation for being in the area, i.e., that he was having dinner at a homeless shelter, form the basis of a defense to the charge of selling cocaine. Petitioner has "outlined a defense raising the issue of the practice of the arresting officers to make false arrests, plant evidence, commit perjury, and falsify police reports or probable cause. [Citations.]" (Warrick, supra, 35 Cal.4th at p. 1027.) Petitioner's

factual scenario was plausible because it might or could have occurred. (*Id.* at pp. 1024–1026; see also *Garcia, supra*, 42 Cal.4th at p. 72.)

The LAPD, relying primarily on *Thompson*, argues that petitioner was required to do more than deny that he participated in a drug sale, and was required to provide an alternative set of facts that accounts for his actions just prior to the alleged drug sale. According to the LAPD, "[o]ne feels an irresistible pull to ask [petitioner]: if the officers are lying, then what did happen? What specific lawful actions, however mundane or uninspired, did [petitioner] engage in during the time the officers had him under observation?" The LAPD complains that "[t]o this question, [petitioner's] declaration is silent," and concludes that "[w]ithout such an account, there is no alternative factual scenario presented."

LAPD's reliance on *Thompson* is misplaced. In that case, the police claimed that Thompson gave an undercover officer cocaine base in exchange for two prerecorded \$5 bills. The officer was "wired" during the transaction, and several other officers who were part of the "buy team" operation watched and listened to the transaction. Thompson was arrested by the other officers after the exchange was completed, and the prerecorded bills were found on his person. He was thereafter charged with the sale of cocaine base. (Thompson, supra, 141 Cal.App.4th at p. 1315.) Thompson sought pretrial Pitchess discovery of the records of 11 officers who were involved in the operation. He claimed that he did not sell drugs to the officer and the officers did not recover any "buy" money from him. He claimed that he was in the area where the officers were making arrests, and the officers fabricated the events when they realized he had a prior criminal history. (Thompson, supra, at p. 1317.) The trial court concluded that Thompson had failed to establish good cause and denied his *Pitchess* motion without conducting an in camera review. (Thompson, supra, at p. 1316.) The ruling was upheld on appeal. The Thompson court recognized that under some circumstances the mere denial of facts described in a police report is sufficient to establish a plausible factual foundation, but that Thompson's factual scenario was not plausible because it was not internally consistent or complete. (Id. at p. 1316.) The court explained: "We do not reject

Thompson's explanation because it lacked credibility, but because it does not present a factual account of the scope of the alleged police misconduct, and does not explain his own actions in a manner that adequately supports his defense. Thompson, through counsel, denied he was in possession of cocaine or received \$10 from [the undercover officer]. But he does not state a nonculpable explanation for his presence in an area where drugs were being sold, sufficiently present a factual basis for being singled out by the police, or assert any 'mishandling of the situation' prior to his detention and arrest. Counsel's declaration simply denied the elements of the offense charged." (*Id.* at p. 1317.) The court further explained: "Thompson is not asserting that officers planted evidence and falsified a police report. He is asserting that, because he was standing at a particular location, 11 police officers conspired to plant narcotics and recorded money in his possession, and to fabricate virtually all the events preceding and following his arrest." (*Id.* at p. 1318.)

This case can be factually distinguished from *Thompson*. Here, petitioner presented a nonculpable reason for being in the area of the alleged drug sale, i.e., to have dinner at a nearby homeless shelter. Furthermore, the officers did not find any evidence of drugs or a clear plastic bindle in petitioner's possession when he was arrested. Nor was there a recording of the alleged drug sale. While it is true that the officers found \$12 in petitioner's possession at the time of his arrest, petitioner denied that the money was the product of the sale of drugs. Under these circumstances, and given petitioner's denial that he engaged in a drug sale, we are satisfied that petitioner set forth a specific feasible factual scenario to establish good cause for an in camera review. We conclude that the trial court erred in denying his *Pitchess* motion.³

Petitioner construes this statement as requiring a defendant to provide a motive for police misconduct. Given *Warrick's* clear admonition against such a requirement (*Warrick, supra*, 35 Cal.4th at pp. 1025–1026), we find no such requirement.

Petitioner references *Brady v. Maryland* (1963) 373 U.S. 83, but does not set forth a separate argument that *Brady* error occurred. Accordingly, we do not consider the issue.

DISPOSITION

Let a writ of mandate issue directing the superior court to vacate its ruling of July 21, 2008, and conduct an in camera review of the two officers' personnel files relating to making false arrests, planting evidence, fabricating police reports or probable cause, and committing perjury.

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	_		, J.
		DOI TODD	
I concur:			
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	, P. J.		
BOREN			

I respectfully dissent.

I do not agree with the majority that the trial court abused its discretion in finding "nothing . . . [more than] mere denials" and thus an insufficient showing of good cause to warrant discovery of officer personnel records.

Rather, in my view, *People v Thompson* (2006) 141 Cal.App.4th 1312 (*Thompson*), as it refines the mandate of *Warrick v Superior Court* (2005) 35 Cal.4th 1011 (*Warrick*), is applicable here. Thompson was arrested following a street sale of drugs to an undercover officer. Thompson sought discovery of the officers' personnel records on his counsel's declaration that "the officers did not recover any buy money from the defendant, nor did [he] offer and sell drugs to the undercover officer." (*Thompson, supra*, at p. 1317.) Additionally Thompson claimed that he was arrested "because he was in an area where [the police] were" making arrests and he was arbitrarily stopped. The events were then "fabricated" and evidence was planted on him. Our Court of Appeal found that to be insufficient—not because it was incredible—but because it did "not explain [Thompson's] own actions in a manner that adequately supports his defense." (*Ibid.*)

Here petitioner provides even less. Through his counsel he allows that he was in the area of his arrest to have dinner; that he "did not engage in a hand to hand sale of cocaine to co-defendant [Pittman], or any other person, as alleged in the police report"; and that "the money recovered from [petitioner's] possession at the time of his arrest was not the product of the sale of drugs to [Pittman] or any other person." This is nothing more than a denial of wrongdoing with a statement of his intended plan for dinner and the inference that the police conspired to misrepresent the true events. Taken in the context of this case, including awareness of the simultaneous arrest of Pittman, 1 the trial court

Consideration of materials other that the defendant's declaration in determining a specific factual scenario is authorized by *Warrick*, *supra*, 35 Cal.4th at page 1025.

was well within its discretion in finding that petitioner failed to establish any plausible	e
factual foundation for the claim of officer misconduct as required by Warrick.	

For the reasons given, I would deny the petition for writ of mandate.

	, J.
CHAVEZ	